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7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**
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10 TRUSTEES OF THE OPERATING
ENGINEERS PENSION TRUST, *et al.*,

11 Plaintiffs,

12 v.
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14 RICHARD THORNTON, *et al.*,

15 Defendants.

Case No. 2:10-CV-00502-KJD-PAL

ORDER

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17 Presently before the Court is Defendant Richard Thornton's Motion to Set Aside Clerk's
18 Entry of Default (#15). Plaintiffs filed a response in opposition (#17). Also before the Court is
19 Plaintiff's Motion for Default Judgment (#13). Defendant Richard Thornton ("Thornton") filed a
20 response in opposition (#13) to which Defendant replied (#18).

21 **I. Background and Procedural History**

22 Plaintiffs filed the present action on April 9, 2010. Defendant Richard Thornton was
23 personally served with the summons and complaint on or about April 16, 2010. On April 16, 2010, a
24 Voluntary Petition under Bankruptcy Code Chapter 7 was filed for Defendant Thornton Concrete
25 Pumping, Inc. Defendant Thornton's answer was due May 4, 2010. Plaintiffs' counsel did not
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1 inform Richard Thornton's counsel that they were moving for entry of default or inquire about
2 Thornton's intention to proceed.

3 On May 7, 2010, the Clerk of the Court entered default against Richard Thornton. On May
4 11, 2010, Thornton filed his answer. On July 20, 2010, Plaintiffs filed their motion for default
5 judgment. On July 28, 2010, Thornton filed the present motion to set aside entry of default.

6 II. Analysis

7 Pursuant to Federal Rules of Civil Procedure 55(c), a court may set aside entry of default "for
8 good cause shown." The "good cause" standard is the same standard that governs vacating a default
9 judgment under Rule 60(b). See Franchise Holding II, LLC v. Huntington Restaurants Group, Inc.,
10 375 F.3d 922, 925 (9th Cir. 2004). The law favors deciding a case on its merits. See id. Thus, a
11 default judgment is appropriate only in extreme circumstances. TCI Group Life Ins. Plan v.
12 Knoebber, 244 F.3d 691, 696 (9th Cir. 2001).

13 The Court considers three factors in analyzing good cause: (1) whether the defaulting party
14 engaged in culpable conduct leading to the default; (2) whether the defaulting party has a meritorious
15 defense; and (3) whether vacating the entry of default would prejudice the plaintiff. See Franchise
16 Holding, 375 F.3d at 926. The court has discretion to deny the motion to set aside default if any one
17 of the three factors favor plaintiff. See id. For the reasons stated *infra*, the Court finds that
18 Defendant has shown good cause to vacate the entry of default.

19 A. Culpable Conduct

20 When examining culpable conduct, the court concurrently examines any excusable neglect of
21 the defaulting party. See id. at 927. Defendant's conduct is culpable if it "received actual or
22 constructive notice of the filing of the action and failed to answer" or otherwise defend. Direct Mail
23 Specialists, Inc. v. Eclat Computerized Techs., Inc., 840 F.2d 685, 690 (9th Cir. 1988). A
24 defendant's failure to answer, however, may be excused depending on the reason for the delay if
25 defendant acted in good faith. See TCI Group, 244 F.3d at 696. Further, conduct is culpable only
26 where the explanation of the default is consistent with a devious, deliberate, willful or bad faith

1 failure to respond. See Employee Painter's Trust v. Ethan Enters., 480 F.3d 993, 1000 (9th Cir.
2 2007).

3 Here, Plaintiffs have not argued that Richard Thornton's counsel was notified that they would
4 be seeking entry of default as required by Nevada Rule of Professional Conduct 3.5A. See Cen Val
5 Leasing Corp. v. Bockman, 668 P.2d 1074 (Nev. 1983)(failure to inquire of opposing counsel about
6 intention to proceed before seeking default is grounds for setting aside default). Defendant Thornton
7 has met his burden in establishing that he acted in good faith. Once Defendant's counsel became
8 aware that default had been entered, he filed his answer within one week. The present motion was
9 filed when it became clear that no agreement resolving the entry of default could be reached and that
10 Plaintiffs would seek a default judgment. Therefore, the Court finds that Defendant's counsel was
11 acting in good faith, and his conduct was not culpable. Accordingly, this factor weighs in favor of
12 setting aside the entry of default.

13 B. Meritorious Defense

14 To succeed on a motion to set aside a default, the defendant must set forth specific facts that
15 constitute a defense. See Franchise Holding, 375 F.3d at 926. Further, mere general denial, without
16 facts to support it, is not sufficient. See id. Here, Defendant has set forth specific facts that
17 constitute a meritorious defense. Specifically, the Defendant denies that he is an alter ego of
18 Thornton Concrete Pumping. Accordingly, this factor weighs in favor of setting aside default.

19 C. Prejudice

20 Plaintiffs argues that they will be prejudiced if default is set aside. However, the rules favor
21 the resolution of cases on their merits. See TCI Group, 244 F.3d at 695-696. Here, Plaintiffs have
22 made no showing that setting aside the entry of default will prejudice them. Specifically, recourse
23 against Thornton personally will not be thwarted merely because the case will be litigated on the
24 merits. Plaintiffs will have adequate opportunity to prove that Thornton is liable under any of the
25 theories they press. Having to litigate the case on the merits rather than benefitting from entry of a
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1 default judgment is not prejudice adequate to deny Defendant's motion. Accordingly, this factor
2 weighs in favor of setting aside the default.

3 III. Conclusion

4 Defendant Richard Thornton's Motion to Set Aside Clerk's Entry of Default (#15) is
5 **GRANTED**;

6 IT IS FURTHER ORDERED that the Clerk of the Court **VACATE** Entry of Default as to
7 Defendant Richard Thornton (#8);

8 IT IS FURTHER ORDERED that Plaintiff's Motion for Default Judgment (#13) is **DENIED**.

9 DATED this 17th day of December 2010.

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Kent J. Dawson
United States District Judge
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